

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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Virginia Business Bank,
Plaintiff
v.
Sonabank, N.A.,
Defendant / Counterclaim Plaintiff
v.
Federal Deposit Insurance Corporation,
in its Capacity as Receiver for Virginia
Business Bank,
Counterclaim Defendant

Civ. Action No. 1:11CV907-LMB/TCB

CLERK OF U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441, 1446 and 12 U.S.C. § 1819(b)(2), Counterclaim Defendant Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Virginia Business Bank, hereby removes the action *Virginia Business Bank v. Sonabank, N.A.*, Civil Case No. CL-2010-17451, from the Circuit Court for Fairfax County (the "state court action") to the United States District Court for the Eastern District of Virginia. In support of removal, the FDIC, as Receiver for VBB, states as follows:

BACKGROUND

1. On December 10, 2010, Plaintiff Virginia Business Bank ("VBB") commenced the state court action by filing a Complaint and Motion for Preliminary Injunction against Defendant Sonabank, N.A. ("Sonabank"). On March 31, 2011, VBB filed an Amended Complaint.
2. On April 19, 2011, Sonabank filed an Answer, Affirmative Defenses, and a Counterclaim. Sonabank's Counterclaim alleges one count of breach of contract against VBB.
3. On July 29, 2011, VBB became a failed bank. On July 29, 2011, the Virginia State Corporation Commission ("VSCC") entered an order closing VBB pursuant to VSCC's authority

under Chapter 8 of Title 6.2 of the Code of Virginia. *See* Order of VSCC Closing VBB, Case No. BFI-2011-00208, attached hereto as Exhibit A.

4. On July 29, 2011 an Order was entered appointing the FDIC as Receiver for VBB. *See* Order Appointing a Receiver, CL 11-3567, attached hereto as Exhibit B. The FDIC accepted this appointment the same day. *See* Letter from FDIC Accepting Appointment as Receiver, attached hereto as Exhibit C. Accordingly, on July 29, 2011, the FDIC as Receiver succeeded to all “rights, titles, powers and privileges” of VBB, pursuant to 12 U.S.C. § 1821(c)(3)(A) and (B), and 1821(d)(2)(A). On July 29, 2011, acting pursuant to its authority under 12 U.S.C. § 1823(c), the FDIC, as Receiver, concluded a Purchase and Assumption Agreement (the “Agreement”) with Xenith Bank in which Xenith Bank purchased the assets of VBB and assumed several of its liabilities, but not the counterclaim at issue here. *See* Excerpts from Purchase and Assumption Agreement, attaching relevant provisions hereto as Exhibit D. 1/ As reflected in the Agreement, Xenith Bank assumed VBB’s secured debts and liens. *See id.* at 9, Article II, 2.1(b). Xenith Bank did not, however, assume VBB’s liabilities for unsecured claims. *Id.*

5. FDIC, as Receiver, retained liability for unsecured claims against VBB, including the counterclaim at issue here.

6. In 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act (“FIRREA”) in response to the crisis in the savings and loan industry and established a system to reorganize or liquidate failed financial institutions. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989); 12 U.S.C. §§ 1821(d)(2). Under FIRREA, a person or entity with claims against a failed financial institution

1/ The entire Agreement is available at www.fdic.gov/bank/individual/failed/vbb_p_and_a.pdf.

must submit those claims to the FDIC, acting as receiver for the failed institution. 12 U.S.C. § 1821(d)(6).

7. On August 18, 2011, by certified letter, the FDIC sent a claims notice to Counterclaim Plaintiff Sonabank and to its counsel in this case notifying Sonabank of the need to submit a proof of claim form by November 2, 2011. *See* Letters to Sonabank and Sonabank's Counsel Re: Notice to Present Proof of Claim, attached hereto as Exhibits E and F, respectively.

BASIS FOR REMOVAL

8. As set forth below, the basis for removing this action is federal question jurisdiction.

9. On August 22, 2011, by Notice, the FDIC as Receiver for VBB Bank was substituted as Counterclaim Defendant in the state court action pursuant to 12 U.S.C. § 1821(d)(2). *See* Exhibit G-19, Notice of Substitution of Party, attached hereto.

10. Pursuant to 12 U.S.C. § 1819(b)(2)(A), any action to which the FDIC is a party in any capacity, including as a receiver, save for exceptions not applicable here, "arises under the laws of the United States." ²/ Accordingly, under 28 U.S.C. § 1441(b), this case is removable to federal court because of 12 U.S.C. § 1819(b)(2)'s conferral of federal question jurisdiction pursuant to 28 U.S.C. § 1331. Since the FDIC is currently a party in the state court action, *the entire case is deemed to arise under federal law* pursuant to 12 U.S.C. § 1819(b)(2) and the *entire case* must be removed. *See Bucher v. FDIC*, 981 F.2d 816, 819 (5th Cir. 1993).

11. This Notice of Removal is being filed within ninety (90) days of FDIC's substitution as a party in the state court action as provided by 12 U.S.C. § 1819(b)(2)(B).

² / The exception set forth under 12 U.S.C. § 1819(b)(2)(D) is not applicable here because the necessity of completing FIRREA claims process, and the substantive and procedural rules governing the claims process, involve interpretation of federal law.

12. Consent of the other parties to this removal is not necessary. *See* 12 U.S.C. § 1819(b); *Casey v. FDIC*, 583 F.3d 586, 591 (8th Cir. 2009); *In re FSLI*, 837 F.2d 432, 435-436 (11th Cir. 1988); *FDIC v. Otero*, 598 F.2d 627, 630 (1st Cir. 1979); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 676 (5th Cir. 1979); *Franklin Nat. Bank Securities Litigation v. Anderson*, 532 F.2d 843, 842, 851 (2nd Cir. 1976).

13. Venue properly lies with this Court pursuant to 28 U.S.C. § 1441(a) and 1446(a), as this action is pending in the Circuit Court for Fairfax County, Virginia, which is in this district.

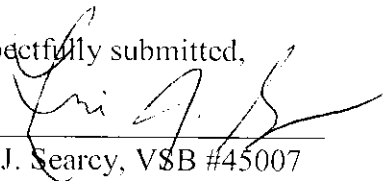
14. Written notice of this removal has been given pursuant to 28 U.S.C. § 1446(d). Concurrent with filing of this Notice of Removal, Counterclaim Defendant FDIC, as Receiver for VBB, is: (a) filing by courier with the Clerk of the Circuit Court of Fairfax County a Notice of Filing of Notice of Removal attaching this Notice of Removal as an exhibit; and (b): serving Sonabank by courier with the Notice of Filing of Notice of Removal and this Notice of Removal. A copy of the Notice of Filing of Notice of Removal (without this exhibit) is attached hereto as Exhibit G-20.

15. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, orders, and other filings served upon the parties in the state court action are attached hereto.

WHEREFORE, FDIC as Receiver for Virginia Business Bank, removes the state court action to the United States District Court for the Eastern District of Virginia.

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Respectfully submitted,

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*Attorneys for Defendant Federal Deposit Insurance Corporation,
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Dated: August 24, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August 2011, I sent the foregoing as follows:

By courier for hand delivery on:

John C. Cowherd, Esq.
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Counsel for Defendant / Counterclaim Plaintiff Sonabank, N.A.

By electronic and first-class mail on:

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